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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

Overruled by 57 Comp. Gen. ——
(B-190784, 5-25-78)

B-167723

SEP 12 1969

Mr. R. G. Loveless
Authorized Certifying Officer
Region 3
General Services Administration

Dear Mr. Loveless:

Your letter of August 14, 1969, reference GSA File No. 155-70, requests our decision on the question of whether you may pay Baleo Security Service the money you are withholding, and should recover back the money already paid under Contract Number GS-07B-8039, for guard services in Dallas during the period July 1, 1968 through June 30, 1969, in light of the so-called anti-Pinkerton law, 5 U.S.C. 3108.

The circumstances leading to your request and the issues drawn thereby may be summarized as follows:

Section 3108 of title 5, United States Code, provides that:

> "An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the Government of the District of Columbia."

This Office has uniformly ruled that the anti-Pinkerton law is a prohibition against the employment in Government service of employees of detective agencies and is applicable to contracts with detective agencies as firms or corporations as well as to contracts with or appointments of individual employees of such agencies. 8 Comp. Gen. 89, 38 id. 881. And we have also held that the character of services rendered by a detective agency or employees thereof may not be relied upon to work an exclusion from the prohibition but that contracts with protective agencies and their employees as distinguished from detective agencies are not within the purview of the law. 26 Comp. Gen. 303; 41 id. 819; 44 id. 565. As shown in the attached memorandum from your office of Audits and Compliance, Baleo Building Services, Inc., is a Texas Corporation and does business under several assumed names, including Baleo Security Service, Baleo Investigations and Baleo Detective Agency.

Baleo Building Services, Inc., is licensed and bonded as a detective agency as required by municipal regulations of the city of Dallas, Texas, and is currently operating as a detective agency with the same managers,

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office space, telephone number as used for its guard service. The only separation between the detective agency and the guard service is the use of different assumed names by the one corporate entity. The assumed names used by Baleo Building Services, Inc., for its detective agency activities are Baleo Investigations and Baleo Detective Agency while Baleo Security Service is used for its guard service. Baleo Security Service has performed the services called for under the contract and has been paid for all such services except those performed during the month of June, 1969. The question of whether or not payment should be made to the company arises out of the fact that you have just discovered that Baleo Security Service is a part of a company which performs work as a detective agency. In decision number A-24043 dated August 24, 1928, found at 8 Comp. Gen. 89, the Comptroller General held that the act of March 3, 1893, 27 Stat. 591 (now codified as section 3108 of title 5, United States Code) prohibited Government agencies from contracting with firms which perform detective agency type work. The Comptroller General in that decision held that payment for services rendered pursuant to such a purported contract could not be made.

More recently, in decision number B-153681 dated March 18, 1965, we held that the prohibition of the anti-Pinkerton statute and its underlying policy considerations did not afford sufficient reason to look behind the pro forma elements of separate corporate identity which distinguished a guard service company from its parent detective company.

However, in the record before us even that degree of separateness does not exist. For us not to apply the 5 U.S.C. 3108 prohibition to the present situation is to render the statute almost meaningless. This we are not prepared to do, especially in light of the fact that legislation to repeal 5 U.S.C. 3108 did pass the Senate during the 88th Congress and then failed being reported out of the House Committee. 109 Cong. Rec. 19743. We accordingly conclude that the subject contract violates 5 U.S.C. 3108.

The authority of an officer of the United States to enter into a contract binding upon the Government must be found in some legally enacted provision of law. That rule has been long recognized. See The Floyd Acceptances, 7 Wall. 666; Hooe v. United States, 218 U.S. 322; Eastern Extension Tel. Co. v. United States, 251 U.S. 355; United States v. Maltra, 312 U.S. 203; Fries v. United States, 170 F. 2d 726; New York Mail and Newspaper Transportation Co. v. United States, Ct. Cl. No. 162-54, decided July 31, 1957. Everyone is required to take notice of the extent of authority conferred by law on a person acting in an official capacity and this is true for the reason that the Government is not bound by an act of its agent unless he was acting within the scope of his authority. 43 Am. Jur., Public Officers section 256. However, while the Government is not ordinarily bound by an invalid contract,

where goods or services are furnished on the request or order of an officer authorized to contract on behalf of the United States, but the contract is void, there is recognized an obligation to pay the value of such goods and services actually furnished as upon an implied contract for a quantum meruit. See Pacific Maritime Association v. United States, 123 Ct. Cl. 667; 33 Comp. Gen. 533; 38 id. 38, 43; cf. Baltimore & Ohio Railroad Company v. United States, 261 U.S. 385.

It has been the settled practice of our Office since 1945 to regard contracts executed in contravention of the statutory prohibition as not imposing an obligation upon the Government to make payments in accordance with the terms of such illegal contracts. Instead, we have adhered to the general rule of law that the Government, like any municipal body, may become obligated upon an implied contract to pay the reasonable value of the benefits accepted or appropriated by it as to which the United States has the general power to contract. See 84 A. L. R. 936; 110 id. 153; 154 id. 356. Compare, in this connection, the provisions of 41 U.S. Code 117 respecting the settlement of claims based on implied contracts. Hence we are required to hold that any payments made or to be made to Beleo Security Service under this contract constitute unauthorized expenditures of public funds, except to the extent that such payments may be justified as representing the fair and reasonable value of services and supplies accepted by the Government, including such amount of profit thereon as would constitute just compensation under the circumstances. See Matter of Shaddock v. Schwartz, 158 N. E. 872; and the annotations in 84 A. L. R. 936; 38 Comp. Gen. 38, 43.

If it is determined by the General Services Administration that the contract price for the services rendered through June 30, 1968, represents the fair and reasonable value thereof, we would have no objection to the payment of such amount.

Sincerely yours,

R.F.KELLER

For the Comptroller General
of the United States